IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

SA.No. 83 of 1994()

AS.36/1988 of SUB COURT, TIRUR
OS.80/1983 of MUNSIFF MAGISTRATE COURT,PONNANI
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PLAINTIFFS:RESPONDENTS:APPELLANTS:

1. **SANKARAN ALIAS KUTTAN NAIR, S/O.MALAYAMKALATH PULAKKOOTTIL, KOTTIYIL KUMMINI AMMA, AGED 65 YEARS, RESIDING AT EDAPPAL AMSOM AND DESOM OF PONNANI TALUK..**

2. **PAPPY AMMA, D/O....DO.... AGED 72 YEARS, RESIDING AT ....DO....DO....**

3. **PADMAVATHY AMMA, D/O...DO... AGED 70 YEARS, RESIDING AT....DO...DO....**

BY ADV. SMT.PRABHA R.MENON

DEFENDANTS 2 TO & NOT PARTY:APPELLANTS 2 TO 4 & NOT PARTY:RESPONDENTS (R4 IS THE L.R. OF D1):
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1. **VASUDEVAN NAIR, S/O. PUTHIYA VEETIL AMMU AMMA, AGED 52 YEARS, RESIDING AT EDAPPAL AMSOM AND DESOM OF PONNANI TALUK.**

2. **SARASWATHI AMMA, D/O...DO.... AGED 46 YEARS, RESIDING AT ...DO...DO....**

3. **INDIRA AMMA, D/O.SARASWATHI AMMA, AGED 27 YEARS, RESIDING AT ...DO....DO....**

4. **P.V.APPU NAIR, S/O.PUTHIYA VEETTIL AMMU AMMA, POONKODI TEA STALL, N.N.PET, PERIYARMAVATTAM DHARAPURAM, COIMBATORE (DT) TAMIL NADU.**

BY ADV. SRI.P.K.MUHAMMED

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.196/1994 IN S.A.NO.83/1994

DISMISSED

2/07/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

KSS

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 83 OF 1994

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Dated this the 2nd day of July, 2007

JUDGMENT

Plaintiffs in O.S.80/1983 on the file of Munsiff Magistrate Court, Ponnani are the appellants. Respondents are the defendants. Suit was filed seeking a decree for permanent prohibitory injunction in respect of three items of property in R.S.No.110/5 of Edappal Village. But the dispute was only in respect of thak No.3 of the plaint schedule properties having measurements of 24x10½ six ft. koles. According to appellants, plaint schedule properties including the disputed property was obtained by first appellant from Edappamveettil tarward as per a lease and jenm right vests with Azhuvancherry Mana and Edappamveettil Tarwad has kanam right over the property and appellants later obtained jenm right from the Land Tribunal as per order in O.A.7910/1975 and also the purchase certificate

and they have been in possession of the properties. It was contended that respondents 1 and 2 filed O.S.40/1979 seeking a decree for permanent prohibitory injunction in respect of the disputed 20 cents of the property and that suit was dismissed and after the dismissal of the suit, they attempted to trespass into the plaint schedule properties and they have no right to do so and so they are to be restrained by permanent prohibitory injunction and from trespassing into the plaint schedule properties. Respondents resisted the suit contending that the disputed property is part of the properties belonging to them and it was obtained on oral lease from Edappam veettil Narayani Amma and subsequently a purchase certificate was also obtained and they are in possession of the property and appellants are not entitled to the decree sought for. Learned Munsiff framed the necessary issues. On the evidence of Pws.1 and 2, Dws. 1 and 2, Exts.A1 to A12, Exts.B1 to B4, C1 and C2, learned Munsiff upheld the case

of the appellants and granted a decree for injunction holding that they have established their possession over the plaint schedule properties including the disputed property. Defendants challenged the decree and judgment before the Sub Court, Tirur in A.S.36/1988. Learned Sub Judge on reappreciation of evidence, set aside the findings of learned Munsiff and held that appellants did not establish their possession of the disputed portion of the plaint schedule properties and therefore they are not entitled to the decree granted by the trial court. The appeal was allowed and the suit was dismissed. It is challenged in the Second appeal.

2. The second appeal was admitted formulating the following substantial questions of law.

1) When Ext.A3 judgment in O.S.No.40/1979 shows that appellants are in possession of the plaint schedule property, should not the first appellate court draw a presumption under section 114 of Evidence Act that the appellants continued

possession of the plaint schedule property.?

2) Whether first appellate court was justified in interfering with the findings of the trial court, when under Ext.A2 decree and A3 judgment respondents are found to be not in possession of the plaint schedule properties?

3. Learned counsel appearing for appellants and respondents were heard.

4. Learned counsel appearing for appellants vehemently argued that O.S.40/1979 was instituted by respondents 1 and 2 against appellants seeking a decree for permanent prohibitory injunction in respect of the disputed portion of the plaint schedule properties herein and under Ext.A3 judgment, respondents are found not in possession of the property and the case of the appellants was upheld by the court and in such circumstances, appellants are presumed to continue in possession of the property till the date of institution of the suit and if so, first appellate court is not justified in interfering with the findings of

the trial court and appellants are entitled to the decree for injunction. It was argued that as under Ext.A3 judgment appellants are found to be in possession of the property, respondents cannot claim that they obtained possession of the property after the dismissal of Ext.A3 suit and therefore first appellate court should not have interfered with the decree. Learned counsel appearing for respondents argued that first appellate court has appreciated the facts and evidence in the proper perspective and that finding of fact cannot be interfered in exercise of the powers of this court under section 100 of Code of Civil Procedure.

5. It is admitted case that O.S.40/1979 was instituted by respondents 1 and 2 against appellants seeking a decree for injunction. It is not disputed that plaint schedule property therein takes in the disputed thak No.3 of plaint schedule properties herein. As argued by learned counsel appearing for appellants, if there was a finding in Ext.A3 judgment, either that the plaintiffs therein

namely respondents 1 and 2 herein are not in possession of the plaint schedule property or that defendants therein namely appellants herein are in possession of the property, respondents are not entitled to raise a contention to the contrary that they are in possession of the plaint schedule property as against the claim for possession raised by appellants. As rightly found by the first appellate court, there is no finding in Ext.A3 with regard to the possession of the respondents or the possession of the appellants. The decree for injunction sought for in Ext.A3 suit was not only against appellants herein but also against the plaintiff in O.S.58/1978. The landlord of the respondents who instituted O.S.58/1978 admitting possession of respondents over the entire plaint schedule property therein. Both the suits were jointly tried. Ext.A3 judgment shows that learned Munsiff held that as the landlord admitted possession of respondents herein, there was no necessity to grant a decree for injunction against

the plaintiff in O.S.58/1978 as there could be no reasonable apprehension of trespass. With regard to the claim raised by the appellants herein, the finding in Ext.A3 reads:-

> "Added to this, from the available evidence there is much force in the case put forwarded by the 3rd defendant in O.S.40/79 that portion of his property is included in the schedule to O.S.40/79. Any way I am not at all convinced that any decree for injunction in O.S.40/79 is justifiable in the facts and circumstances of the case."

There is no finding that plaintiffs therein are not in possession of the disputed 20 cents. There was

also no finding that defendants therein were in possession of the disputed 20 cents herein. Therefore Ext.A3 cannot be used by the appellants to strengthen their case. Their possession was not found by the court. So also possession of the respondents claimed was not negatived. If that be so, relying on Ext.A3 judgment, appellants are not entitled to contend that they are entitled to get a decree for injunction.

6. Learned Sub Judge relying on Ext.C1 report and C2 plan as well as Exts.A4 and A5 reports and plan in the earlier suit O.S.40/1979, entered a factual finding that appellants did not establish their possession of the disputed portion of plaint schedule property. That factual finding cannot be interfered by reappreciating the evidence in exercise of the powers of this court under section 100 of the Code of Civil Procedure. In such circumstance, appellants are not entitled to the decree for injunction, which was originally granted by the trial court and set aside by the first

appellate court.

The appeal fails and is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.83 /94

JUDGMENT

2ND JULY,2007